No. 716

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In The

Supreme Court of the United States

OCTOBER TERM 1955

HARRY H. WINER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:—

Petitioner, Harry H. Winer, prays that a writ of certiorari issue to review the judgment and orders of the United States Court of Appeals for the Sixth District affirming the judgment of conviction of the United States District Court for the Eastern District of Tennessee. Petitioner was convicted by a jury and sentenced by Judge Leslie R. Darr to serve two years for alleged violation of 18 U. S. Code Sec-

tion 659 (receiving goods stolen from an interstate shipment), which conviction was affirmed by a 2 to 1 vote by the Court of Appeals for the Sixth Circuit. (Judge Shackleford Miller dissenting).

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals for the Sixth Circuit is not as yet reported. Both the majority (Infra 1a) and dissenting (Infra 16a) opinions are, however, attached hereto as an appendix.

JURISDICTION

The Judgment of the Court of Appeals was entered on January 13, 1956, and an order denying the petition for re-hearing, but staying the mandate was entered on February 3, 1956. The jurisdiction of the court is invoked under 28 U.S.C. Section 1254.

Two substantial constitutional questions are presented. One, discussed in both the majority and dissenting opinions, arises under the interstate commerce clause, and raises a problem as to whether a federal offense was involved. The second, arises under the Fifth and Sixth Amendments and presents a question as to the fairness of the composition of the jury which tried the defendant.

QUESTIONS PRESENTED

I. Defendant was charged with receiving goods stolen "from an interstate shipment of freight" and the question presented is whether the interstate journey ended before the theft. If the goods were not in interstate commerce, then the defendant could not be guilty under the provisions of 18 U.S.C. Section 659. This section specifically provides

that the federal court only has jurisdiction of a charge of receiving stolen goods when the theft is made from an interstate shipment. This limit on the judisdiction of the federal courts arises because of the provisions of Article 1 Section 8 of the United States Constitution. The federal government would not have jurisdiction if the interstate journey had ended.

The undisputed evidence was that three boys had stolen property from two box cars on a siding in Chattanooga, Tennessee. Later they claimed they had sold them to the defendant, Winer, who, without qualification, denied the purchase. "The property was stolen from two different railroad cars, one consigned by the Southern Railway Company, Memphis, Tennessee to the Southern Railway Company, Chattanooga, Tennessee; and the other consigned by the Southern Railway Company, Charlotte, North Carolina to the Southern Railway Company, Chattanooga, Tennessee." (Opinion infra p. 4a) The cars arrived in Chattanooga on January 25, 1954 and February 4, 1954. The consignee, the railroad itself, noted receipt on its records. However, since it did not have sufficient storage space in its warehouse, the railroad placed them on a siding Track 22. The thefts occurred on or about February 10, 1954.

This is the first case of its kind where a theft is involved from a shipment by one railroad to itself, and the question is when the interstate journey ended. The majority of the court by permitting the railroad officials to contradict by oral testimony their official records, held that the goods even though on a siding were still in interstate commerce, and would remain in interstate commerce until unloaded. The dissenting opinion holds that the railroad had notice of the arrival, and placed them on its storage tracks. "The delay in unloading was for the convenience of the consignee". (Dissenting opinion infra 16a)

We submit that the majority opinion is based upon self-serving declarations, which seek to contradict official records, and the minority opinion is the correct one. The decision of the majority is directly contrary to *O'Kelley* v. *United States*, 116 F. (2d) 966 (CA8) and *Hall* v. *United States*, 182 F. (2d) 833, 835 (CA8).

This court should decide whether a railroad company shipping to itself can extend federal protection of its shipments indefinitely merely by placing cars on a siding or whether when it does so, because its warehouse is filled and, for its own convenience, the interstate journey has terminated. To uphold the decision of the court there would be one rule if goods are shipped by truck, and another if goods are shipped by rail.

II. *The second question* deals with the propriety of permitting three jurors to sit on a case when they had just previously convicted a co-defendant of an identical charge on which he had been jointly indicted. The record shows that one Marvin Siskin and the petitioner, Harry H. Winer, were jointly indicted for receiving stolen goods. Separate trials were granted, and on November 18, 1954 Siskin was found guilty. On the very next day, November 19, 1954 Winer's case was called, and three of the jurors, who had found Siskin guilty, were permitted to sit on Winer's case. This was clearly in violation of appellant's rights as set forth in *Lett* v. *United States*, 15 F. (2d) 690 (CCA8) and *Kleindienst* v. *United States*, 48 App. Div. (D.C.) 190; See also *Quig* v. *United States*, 33 F. (2d) 820, 821 (CCA8) and 160 ALR 755.

In this case the three young witnesses who stole the goods testified in both cases, and their credibility was a crucial matter for the jury. Without their testimony a conviction could not have been obtained. The jurors having passed on their credibility in the Siskin case, were not unbiased jurors when they sat on the appellant's case.

Furthermore, both the trial court and the Court of Appeals held that the question whether an interstate shipment was involved, was a question for the jury. Siskin and Winer were charged with receiving goods stolen from the same railroad cars at the same time. As to each case, the theft was after the railroad noted in its records that the goods were received. Jurisdiction with respect to the crime charged against each man depended upon the same facts. Winer contended that the goods received by him were purchased from Siskin—a dealer—without knowledge as to how they were acquired by Siskin and checks evidencing payment for goods by Winer to Siskin were introduced in evidence. Since the jury in the Siskin case found him guilty, the members of that jury who sat in the Winer trial had already decided this important jurisdictional point in favor of the government before they heard any testimony presented at the Winer trial.

We contend that the test in a criminal case is whether the jurors might have been prejudiced by extraneous matters, and, if so, the purity of any such verdict is open to serious doubt. As a result of permitting these three jurors who had prejudged the credibility of witnesses against appellant, Winer, to sit, and who had already passed on the jurisdictional point, the appellant did not have a fair trial as guaranteed by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The significant portion of Article I, Section 8 of the Constitution of the United States reads:—

> "The Congress shall have power * * * to regulate commerce with foreign nations and among the several States, and with the Indian tribles."

The only statute involved is Title 18 Section 659 U. S. Code which reads:—

> "Whoever embezzles, steals, or unlawfully takes, carries away, or conceals or by fraud or deception obtains from any railroad car, wagon, motor truck, or other vehicle or from any station, station house, platform or depot, or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or
>
> "Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or"

As to the second question, the significant portion of the amendments involved read:

> *FIFTH AMENDMENT.* "No person shall • • • be deprived of liberty • • • without due process of law."
>
> *SIXTH AMENDMENT.* "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury • • •".

STATEMENT OF CASE

Harry H. Winer, the appellant, was engaged in the scrap business in Chattanooga, Tennessee under the name of the American Iron & Metal Company.

Two indictments were returned against him alleging that he bought and received certain brass bearings, and copper wire which had been stolen from "a Southern Railway Company railroad car located on a railroad siding belonging to said" railroad company.

One indictment charged Winer alone in three counts of receiving goods "which were stolen while moving as, and

were part of and which constituted interstate commerce of freight consigned by the Southern Railway Company, Memphis, Tennessee to Southern Railway Company, Chattanooga, Tennessee". (App. 4a). The other indictment containing two counts jointly charged Siskin and the appellant, Winer, with receiving goods stolen from a Southern Railway shipment from Charlotte, North Carolina, as consignor, to itself as consignee in Chattanooga. This indictment likewise alleged the car was moving in interstate commerce, and the theft was from the car on the railroad siding. (App. 7a, 8a).

Winer's motion for a severance with respect to the indictment, which named him jointly with Siskin, was granted, but the court ruled that the two indictments insofar as they named Winer, were to be consolidated, and Winer was to stand trial on the two indictments at one trial. Siskin was tried separately, on November 18, 1954 before a jury and he was found guilty.

On the next day Winer's case was called for trial, and three of the jurors who had sat in the Siskin case were permitted to sit in Winer's case.

The government's proof in both Winer's case and Siskin's case depended on the testimony of three young men, who admitted that they stole the property from railroad box cars on a Southern Railway siding in Chattanooga. They were all arrested, pleaded guilty, and two of them were serving sentences at the time of trial. Winer denied that he had purchased anything from these three men. In order to offer some corroboration the Government called Joe Denson, an employee of Winer, who testified that Winer told him not to say anything about what the colored boys had thrown over the fence (App. 94a). Winer denied this emphatically stating he had bought wire from Siskin, and not from the boys (App. 125a, 126a). When after the trial Denson attempted to repudiate his story, the Assistant

District Attorney told him he would be sent to the penitentiary if he changed his story. (App. 173a). Later the attorney for the United States admitted that his threat "should not have been made." The court then told Denson he did not have to incriminate himself, and Denson refused to testify. (App. 174a). Since Denson had already testified for the government he was subject to cross examination on the same subject matter. *Rogers* v. *United States* 340 U.S. 367.

We mention these facts not only because the Court of Appeals commented on the matter at length, but also because without Denson's testimony the nine jurors who had not sat in the Siskin case probably would have voted for acquittal since the Denson testimony was the only evidence of a corroborative nature.

The first question in the case was whether the goods when stolen were in interstate commerce. Some of the property in question was shipped by the Southern Railway to itself in a car from Charlotte, North Carolina to Chattanooga, Tennessee. Other property was shipped by the railroad to itself from Memphis, Tennessee to Chattanooga, Tennessee. Since the line of the Southern Railroad from Memphis to Chattanooga runs through a small strip of Alabama, no question was raised as to the shipment being from one point to another point in the same state.

THE CHARLOTTE SHIPMENT

The railroad company's records show that the shipment from Charlotte, North Carolina by the Southern Railway was consigned to W. W. Folger, a district storekeeper at Chattanooga, and the shipment arrived in Chattanooga on February 4, 1954 (App. 30a). The official records of the railroad show the car is noted as "Received 2-4-54". (App. 30a) The Charlotte car was then placed on Track 22

which was adjacent to the warehouse. Unloading of cars usually took place from Track 1.

Mr. Kimbrough, the general foreman, testified that the reason the Charlotte car was not unloaded at the time was because the railroad did not have room for it at the time in the warehouse. (App. 56a) Because of the lack of room in the warehouse Track 22 which went off into a field (App. 33a) was used as a supplementary storage facility. (App. 56a). The record further shows that in order to move the car from Track 22 a new order would have to be issued by Mr. Folger (App. 42a). This would be a switching operation in the yards at Chattanooga and would not involve interstate commerce. *Lehigh Valley Railroad Company* v. *Barlow,* 244 U.S. 183.

THE MEMPHIS SHIPMENT

The Memphis car arrived in Chattanooga on January 25, 1954 fifteen or twenty days before the alleged theft took place. (App. 55a) This shipment likewise was consigned to Folger, the district storekeeper, and when it arrived on January 25, 1954 it too was placed on the siding — Track 22 (App. 55a). The testimony was to the effect the theft by the boys occurred about twenty days later (App. 57a et seq, 73a et seq, and 85a et seq).

As a matter of fact, even after the theft the Memphis car remained on Track 22 until June 21, 1954 (App. 55a) when new orders were issued from Washington, D.C. to send it to a new destination (App. 57a). *The record is silent as to whether the Memphis car ever was unloaded in Chattanooga.*

Under this state of the record the District Court declined to direct a verdict of acquittal, and left the question, which was purely a legal one, to the jury to determine whether the goods at the time of the theft were moving in interstate

commerce. However, three of the members of the jury who sat in the Siskin case had already decided this question in favor of the government.

The majority of the Court of Appeals attempts to justify a finding of guilt on that record. Despite the fact that the official records showed that the cars arrived on January 25, 1954 and February 4, 1954, by considering oral self serving ex post facto declarations, the Court of Appeals permitted these records to be impeached.

We quote from the opinion of Judge McAllister:—

> "The cars on Track 22 were not to be unloaded, and could not be unloaded for the railroad's purposes, until they had been switched over to Track 1, where they could be unloaded directly into the company's warehouse. The railroad, on its records, does not show cars received until they are on Track 1 for unloading. Although the railroad records show the cars as being in the yard, the division officer stated: 'We never receive the material until we check them out'."

It was on the basis of the oral statements of the railroad officials that the shipment is not considered ended until the material is placed in the warehouse that the majority holds the good were still in interstate commerce despite the record of the railroad showing the dates of arrival.

On the other hand the dissenting opinion shows that "the delay in unloading was for the convenience of the consignee," and that "delivery by the carrier is completed when the car is placed on consignee's storage tracks although it may be necessary later to move it to a platform for unloading purposes", and that "theft of goods from a warehouseman is a state offense".

Summarizing these facts, the question is (1) whether after cars arrived and are placed on a siding for the convenience of the carrier, can the carrier extend interstate

coverage by just refusing to unload, particularly when the warehouses are filled and (2) Did the Defendent receive a trial before a jury with his rights protected as required by the 5th and 6th Amendments to the Federal Constitution.

SPECIFICATIONS OF ERROR

1. Appellant contends that the District Court erred in not directing a judgment of acquittal since the undisputed evidence showed that the goods were not in interstate when the theft occurred.

2. The court erred in permitting three jurors to sit on appellant's case when the day before these same three jurors had sat on a jury which had found Marvin Siskin, jointly indicted with appellant, guilty. In the Siskin trial the three jurors heard three witnesses, who likewise testified against appellant, and had to pass upon their credibility. The three jurors sitting in appellant's case were not unbiased, they passed on the jurisdictional questions in the Siskin case, and appellant did not have a fair trial.

REASONS FOR GRANTING THE WRIT

I

This is the first time that the question of how far interstate protection extends when a railroad ships goods over its own tracks to itself as consignee. Can the railroad by failing to unload and permitting the goods to remain on a storage tract extend the interstate protection, or is the interstate journey ended when the goods arrive and the car is placed on a siding for the convenience of the carrier.

If the decision of the Court of Appeals is permitted to stand, then we shall have one rule for railroads, and another rule for other carriers. Suppose for example the A & P

Company ships goods in its own trucks from a warehouse in Philadelphia to one in New York. The driver, for his own convenience arrives in New York, on February 4, 1954, the arrival is noted on the records, but the truck is not unloaded for ten days. Can anyone doubt but that the interstate journey ended when the truck was permitted to remain in the driveway, and was not unloaded merely because the warehouse might have been filled? Can the employees of A & P Company merely by saying that they never considered the goods had arrived until they were unloaded and checked at the warehouse extend the federal protection under Article I Section 8 of the Constitution of the United States.

There are no decisions by this court directly in point as this is the first instance of a case where the carrier was both consignor and consignee and the question is the time of termination of the interstate journey. No such question was presented in the cases cited in the majority opinions of the Court of Appeals. In those cases the goods were taken while they were in interstate movement.

In shipments to private consignees, the private consignee unloads the goods as soon as possible to prevent demurrage charges. The railroad does not charge itself demurrage for storing its own goods on cars on a siding. If there was a shipment to a private consignee he must take the goods within a reasonable period of time or the relationship of the parties is changed. See *Brown Shoe Co.* v. *Hardin*, 77 W. Va. 611. Why if the railroad leaves the cars on a siding for an unreasonable time should it not be considered as a warehouseman rather than a carrier? In this connection the Memphis car remained on the siding for over five months.

A rule that leaves the question of the arrival of goods to the discretion of railroad officials oral testimony, and

not to what is shown by their official records is unsound. In dealing with a violation of the National Motor Theft Act (18 U.S. Code 408) the court said in *Davidson* v. *United States*, 61 F. (2d) (CA8) 250, 255:—

> "It is, of course, an indispensable ingredient of the offense that the car at the time it was received, concealed, store, bartered, sold, or disposed of, was 'moving as or was a part of, or constituted interstate commerce'. *If the car has lost the character of interstate commerce at the time it was received, etc., no offense against the laws of the United States have been proven.* * * * The mere fact that the car had theretofore been transported in interstate commerce is not sufficient. The act does not purport to exercise jurisdiction over individuals who receive or sell stolen cars after such cars cease to move in or be a part of interstate commerce".

At a further point the court said:—

> "Receiving a stolen car that has lost its character as interstate commerce constitutes no crime against the laws of the United States, (Wolf v. United States, (CCA) 36 F. (2d) 450). The Government has totally failed to sustain this burden of proof, and there is no testimony or circumstances in the record that would support a finding that this car was in interstate commerce at the time it was received by these two defendants."

The judgment against defendants in the Davidson case was reversed on the ground that the Government failed to prove the stolen automobile was still moving in or was a part of interstate commerce. In this case the Government totally failed to prove that the goods after their arrival and when placed on the siding, Track 22, still retained their interstate character.

One needs only to examine the cases cited by Judge Miller to find that when the goods were placed on a siding, that the tracks were being used as a supplementary warehouse. Cases such as *Wolf* v. *United States*, 36 F. (2d) 450 (CCA7); *Grimsley* v. *United States*, 50 F. (2d) 509 (CCA5) and *Cox* v. *United States*, 96 F. (2d) 41 (CA8) all deal with the limits of interstate jurisdiction, and *New York Central & Hudson River R.R. Co.* v. *General Electric Co.*, 219 N.Y. 227, 1 ALR 1417 holds that the journey is completed when the car is placed on consignee's storage tracks.

The evidence shows that the Memphis car was placed on a siding and then re-consigned. This court has held that in such a case when the cars are placed on the siding they have reached their destination if there is to be a re-consignment to a new destination. See *Berwind-White Coal Mining Co.* v. *Chicago & Erie R.R. Co.*, 235 U.S. 371. Switching from the storage track to the loading dock in the same yard would not be an interstate journey. *Lehigh Valley Railroad Company* v. *Barlow*, 244 U.S. 183; *Chicago, Burlington & Quincy Railroad Company* v. *Harrington*, 241 U.S. 177.

As said in *Hall* v. *United States*, 182 F. (2d) 833, 834:—

> "It is not a federal offense to steal a case of Camel cigarettes from the Missouri Pacific Railroad docks in Kansas City, Missouri, *unless the theft is from a shipment moving in interstate commerce.* It was, therefore, encumbent upon the Government to prove not only that Hall stole or participated in the stealing of a case of Camel Cigarettes from the docks, but that the case stolen was from the interstate shipment specified in the indictment."

We submit the undisputed evidence shows that the interstate journey terminated prior to the theft, and the federal court had no jurisdiction. We submit the facts fall clearly

within the statement of *O'Kelley* v. *United States*, 116 F. (2d) 966, 968:—

> "At common law larceny is not in itself a federal offense. It is an offense only when the property taken is at the time of the theft a part of an interstate or foreign shipment of freight. As the subject of larceny here did not when taken constitute an article of interstate commerce, it was not within the protection of the Federal statute. A verdict of not guilty should therefore have been directed as to both counts of the indictment against Treadway."

The result of the decision in this case will be to permit the railroad company by its own acts to extend federal protection of shipments to itself far beyond the protection afforded when the shipment is from a private consignor to a private consignee. We should not have one law "to him that is homeborn, and unto the stranger that sojourneth among you" another. Cf. Exodus 12:49.

II

The fact that three jurors had sat on the Siskin jury when appellant had been jointly indicted with Siskin clearly deprived petitioner of a fair trial by an unbiased jury. Without the citation of authority and with the statement that "hindsight, possessed by everyone, suggests that it would have been the part of wisdom, however, not to have called any of the jurors who sat on Siskin's case to sit on appellant's case," (Infra 11a) the court overrules the claim of petitioner, saying:—

> "The jury's verdict of guilty, therefore, could not have been vitiated by the circumstances that three members had sat on a previous case in which they had believed the testimony of the same felons whom they afterward also believed as witnesses in appellant's case. Appellant

> suffered no deprivation of a fair trial as a result of the service of some of the jurors in the prior case." (Infra 11a)

Just how the court arrived at this conclusion is difficult to understand. The same indictment (No. 10430) in which both Siskin and Winer were indicted went to the jury in Siskin's case. The guilt or innocence of both defendants in both cases depended upon the credibility of the testimony of the three boys, Daniels, Green and Mattox (App. 61a, 67a, 89a). In the Siskin case, Siskin offered no evidence at his trial (App. 2a) while Winer denied without qualification the charge. Winer testified he had bought wire from Siskin and paid Siskin by check (App. 137a, 125a, 176a). Having convicted Siskin who offered no evidence, the three jurors having passed on the credibility of the three boys, could have felt that any finding in reference to petitioner's innocence would have been inconsistent with their finding of Siskin, a co-defendant guilty. In such a situation it served no purpose to permit introduction of testimony of Winer's "unquestioned reputation for honesty" (Infra 9a).

Three jurors knew that Siskin had been found guilty on testimony offered by the same three witnesses, and began their deliberations with that knowledge. If, in the opening statement, the United States attorney had told the jury that Siskin, a co-defendant had been found guilty it would have been prejudicial error requiring a new trial. *Quig* v. *United States*, 33 F. (2d) 820, 821 (CCA8). Yet the court in this case permitted three jurors to sit who not only knew of the guilt of the co-defendant, but were on the jury that found him guilty. They would not be human if they did not advise the other jurors of that fact.

The fact that on the *voir dire* examination, they said that they were without bias, makes the statement in *Kleindienst* v. *United States*, 48 App. Div. 190 appropriate:—

> "Had any juror insisted that he was not prejudiced, his answer would have been inconsistent with human experience."

To permit the three jurors to sit in the case of the petitioner clearly violated the rights of petitioner as set forth in *Lett* v. *United States*, 15 F. (2d) 690 (CCA8); *Kleindienst* v. *United States*, 48 App. D. C. 190 and cases cited in 160 ALR 755.

While Siskin was not a witness three jurors knew of his guilt, and the language in *Babb* v. *United States*, 218 F. (2d) 538, 542 (CA 5) seems significant:—

> "A defendant is entitled to have the question of his guilt determined upon the evidence against him, not on whether a government witness has pleaded guilty to the same charge."

Here the jurors were to determine the guilt of petitioner on the evidence against him without being prejudiced by the fact that they knew a co-defendant had been found guilty.

In state courts it has generally been held that the test in a criminal case is not whether the jurors were actually prejudiced by extraneous matters, but whether they might have been prejudiced. *Thompson* v. *Commonwealth*, 193 Va. 704, 70 S.E. 2d 284. That situation arises where jurors who have sat in a co-defendant's trial are included in the subsequent panel trying the defendant. *People* v. *Mol*, 137 Mich. 629, 100 N.W. 913; *Seaton* v. *State*, 106 Neb. 833, 184 N.W. 890; *Heber* v. *State*, 37 O. Ap. 333; *Commonwealth* v. *Vitale*, 250 Pa. 552.

In *Priestly* v. *State*, 19 Ariz. 371 the court held:—

> "In prosecutions for unlawful sale of intoxicating liquors, where the principal defense was the incredibility of the testimony of three detectives whose testimony was relied on for a conviction and the credibility of defendant's impeaching witness, it was reversible error to compel defendant to select a jury from a panel, including five jurors who a day or two before rendered

> a verdict of guilty against another defendant in which the defense was the same, and in which the testimony of the same three detectives was relied on for a conviction."

In this case the testimony of the three boys, Daniels, Green and Mattox, all of whom had pleaded guilty was relied upon both in the Siskin case and in this case. Without their testimony a conviction of the petitioner could not have been upheld. That this is prejudicial is clearly implied in the statement of Justice Jackson in *Gordon* v. *United States*, 344 U.S. 414, 417, that "where . . . the government's case may stand or fall on the jury's belief or disbelief of one witness his credibility is subject to close scrutiny."

The Court of Appeals indulges in the presumption that permitting three jurors to sit in Winer's case when they had found Siskin guilty was not prejudicial, because the jury obviously considered petitioner's attitude and conduct as corroboration of the testimony of the witness. No court can indulge in such presumptuous when there is a biased jury. We think applicable here are the striking words of Justice Holmes and Hughes in their dissent in *Frank* v. *Mangum*, 237 U.S. 309, 345, 347:—

> "This is not a matter of polite presumptions; we must look facts in the face. Any judge, who has sat with juries, knows that in spite of forms, they are extremely likely to be impregnated by the environing atmosphere."

How could the nine other jurors help but be influenced by the three who had passed on the credibility of the witnesses previously, and found a co-defendant guilty at a separate trial.

Furthermore if the question of interstate commerce was to be left to the jury, what good would it serve Winer to

urge the defense, when three jurors had already passed on the same question in the co-defendant's case.

CONCLUSION

We submit that both questions, one dealing with goods moving in interstate commerce, and the other, trial before a jury containing at least three biased and prejudiced jurors are of vital importance. This court has never passed on either question. The petitioner in this case has been convicted on facts which do not constitute a violation of a federal statute, and by a jury containing three jurors who could not possibly judge his guilt or innocence with that impartiality necessary for one to sit on such a panel. The petitioner was neither guilty of a federal offense, nor did he have a fair and impartial trial as guaranteed by the Constitution of the United States.

Respectfully submitted,

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APPENDIX

In The

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. 12453

HARRY H. WINER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

Decided January 13, 1956.

Before SIMONS, Chief Judge; MCALLISTER and MILLER, Circuit Judges.

MCALLISTER, Circuit Judge. Appellant was convicted on an indictment for the offense of receiving, and having in his possession, goods, knowng that they had been stolen from railroad cars while they were moving as and were a part of an interstate commerce shipment of freight, in vio-

lation of Title 18 U. S. C. A., Section 659. On the same trial, he was also convicted on another indictment in which he was jointly indicted with Marvin Siskin as a co-defendant, in which it was alleged that they had bought certain goods which had been stolen from a car while moving as an interstate shipment of freight and that they had received and had in their possession goods which were so stolen, in part of, interstate commerce, in violation of the statute.

Appellant seeks review of the verdict and judgment, contending that the evidence on the trial disclosed that the interstate shipment of freight in question had terminated before the theft: that the trial court committed error in denying appellant's motion for a mistrial which was based on the ground that certain of the jurors sitting on the jury which convicted him had just previously sat on another jury that had convicted Marvin Siskin who had been jointly indicted, as above stated, with appellant Winer, but who had been tried separately as a result of a severance ordered by the court. Appellant also claims error in the refusal of the trial court to grant a new trial on the ground that one of the government witnesses had repudiated his testimony, as well as upon the additional ground of further error alleged to have been committed by the trial court during the hearing of appellant's motion for a new trial.

The government's proofs were to the effect that three young men had joined in stealing property from two railroad boxcars on a siding in Chattanooga, Tennessee. One of them broke the seals on the cars and the others assisted in removing the property. They were all arrested, pleaded guilty, and, at the time of the trial of the instant case at which they were witnesses, two were still serving sentences that had been imposed upon them, and the third had been released on parole. Their evidence, briefly, was to the effect that they had sold a considerable amount of the stolen

property to appellant Winer. The leader among them testified that he had told Winer where the property had come from; that Winer had advised them to be careful and to hold on to the stuff for a few days until he could get a sale for it; that he afterward bought the property from them, as well as additional property stolen from the cars on several subsequent occasions; and that he paid them different amounts at the time of the different sales to him. He further testified that appellant Winer had asked them about the car from which they were stealing certain copper wire, and had inquired about the way in which the shipment was loaded in order to be sure that the stolen wire would not be missed. One of the witnesses testified that they had delivered to appellant a quantity of heavy bearings which they had stolen, by taking them to appellant's junk yard and throwing them over the fence. The evidence also disclosed that the three men had sold a quantity of the goods to Marvin Siskin, who, as said above, was jointly indicted with appellant; and it is conceded by appellant that he purchased such property—innocently, as he claims—from Siskin, and returned it to the railroad company when he discovered that Siskin had purchased it with guilty knowledge.

Appellant denied, without qualification, that he had purchased anything from any of the three men; and none of the property stolen by them was ever found on appellant's premises. The government's evidence, however, was sufficient to present to the jury the question whether the property was stolen from the railroad boxcars, and whether Winer had purchased it with guilty knowledge.

The chief issue in the case, therefore, is whether the property was stolen from railroad cars moving as, and a part of, interstate commerce, inviolation of the statute.

Title 18, U. S. C. A., Section 659, insofar as here applicable, provides:

> "Whoever . . . steals, or unlawfully takes, carries away . . . from any railroad car, . . . with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate . . . shipment of freight . . . ; or
>
> "Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been . . . stolen;"

shall be guilty of the offense proscribed by the statute and liable to fine or imprisonment or both.

The property was stolen from two different railroad cars, one consigned by the Southern Railway Company, Memphis, Tennessee, to the Southern Railway Company, Chattanooga, Tennessee; and the other, consigned by the Southern Railway Company, Charlotte, North Carolina, to the Southern Railway Company, Chattanooga, Tennessee.

It is conceded by appellant that the fact that the carriage is by the owner does not serve to establish that interstate commerce is not involved, nor does it put the property outside the protection of the statute; *Marifian* v. *United States,* 82 F. (2d) 628 (C. C. A. 8); and the circumstance that the shipper, the carrier, the consignee, and the owner of the goods, are one and the same person does not alter or prevent the application of the statute designed to protect commerce, which is here involved. *Friedman* v. *United States,* 233 F. 429 (C. C. A. 1).

The car from Memphis, when it arrived at the Citico Yards in Chattanooga, was placed upon Track 22, on January 24, 1954. The theft from the car occurred before February 16, 1954, on Track 22, and while the shipment was under the seal placed thereon at the point of origin.

The car from Charlotte, when it arrived at the Citico Yards on February 4, 1954, was placed upon Track 22, just a few days before the theft, which occurred while it was on that track and while under the original seal.

The cars on Track 22 were not to be unloaded, and could not be unloaded, for the railroad's purposes, until they had been switched over to Track 1, where they could be unloaded directly into the company's warehouse. The railroad, on its records, does not show cars received until they are on Track 1 for unloading. Although the railroad records showed the cars as being in the yard, the division officer stated: "We never receive the materials until we check them out." In answer to a question on cross-examination as to whether the cars in question had reached their destination and as to whether "it was up to you to load or unload," the general foreman of the storage department of the railroad replied: "The material in the car had not reached final destination until placed in our storehouse." He further stated that the cars in question were not used as additional warehouse storage inasmuch as the shipments were not on the railroad accounts until they received them.

The interstate character of a shipment, insofar as it concerns the purchaser, receiver, or possessor of stolen goods, is to be determined as of the date of the theft. *United States* v. *Gollin*, 166 F. (2d) 123 (C. A. 3). An interstate shipment does not lose its character as commerce until it arrives at destination and is there delivered. *Murphy* v. *United States*, 133 F. (2d) 622 (C. C. A. 6). Even where the interstate shipment arrives at destination, is placed on delivery track, and notice given to the consignee who breaks the seal and unloads part of the shipment, if the carrier again reseals the car pending further unloading by the consignee, and the car is thereafter broken into and goods stolen, the shipment is still in interstate commerce as of the time of the theft. *Chapman* v. *United States*, 151 F. (2d) 740 (C. C. A. 8). Where delivery of imported liquor was made to a consignee at an ocean pier, and was afterward stolen while being taken from the pier to a bonded warehouse by a bonded truck, it was held that the shipment

at the time of theft was still moving in interstate commerce. *United States* v. *Schwartz*, 150 F. (2d) 627 (C. C. A. 2).

Appellant cites *O'Kelley* v. *United States*, 116 F. (2d) 966 (C. C. A. 8), where a shipment, at destination, was delivered to and accepted by the consignee, who broke the seal and unloaded part of the shipment. He then locked the car with his own padlock and thereafter, it was broken into and the balance of the shipment stolen. It was held that the shipment at the time of the theft was not a part of interstate commerce; but this holding was based on the ground that the consignee had accepted and assumed full dominion over the property, which constituted a final and complete delivery; and that controlling consideration is not present in the case before us.

Appellant, however, contends that the shipments were received by the consignee, Southern Railway Company, Chattanooga, on the dates on which the railroad records showed the cars to have been "received," prior to the theft, and that the shipments, therefore, were no longer in interstate commerce after such receipt. The notation on the records that the cars had been received was explained, on cross-examination, by the division officer, who was also the district storekeeper for the railroad. He testified that such record showing the cars had been received on a given date indicated only that the cars had arrived at the yards in Chattanooga and had been placed on Track 22 at that time; and that not until the shipments were unloaded and checked in would the records show receipt of the shipments themselves. In view of the testimony and evidence, the fact that the above mentioned records showed the cars to have been "received" is not conclusive that the shipments were no longer in interstate commerce after the date of their arrival in the Chattanooga Yards.

The trial court instructed the jury, in the course of his charge, that goods are in interstate commerce if the move-

ment of the freight originates in one state and passes through another, even though it comes back to the state from which it started; that such a shipment remains an interstate shipment until it reaches the final termination of the journey, or destination; and that the final termination is the point where it is placed to be unloaded, or is being unloaded, in some cases. "And, as long as a car is still on a track and not placed at the unloading point, it is still in commerce."[1]

We find no error in the trial court's instructions, which are consonant with the authorities above discussed. Under the evidence, the jury could properly find that the cars containing the two shipments in question were in interstate commerce at the time the thefts were committed.

Appellant submits that the trial court prejudiced his case and erred in not granting his motion for a mistrial made at the conclusion of the government's proofs. Appellant's motion for a new trial was based on the ground that certain jurors who sat in a prior case in which Marvin Siskin had been convicted and with whom appellant had been jointly indicted, afterward were permitted to sit in appellant's case, although a severance had been granted. The court had ordered the severance on appellant's motion setting forth that he might be found guilty, by association with Siskin, who had theretofore signed a confession of guilt. Accordingly, appellant was thereafter tried alone.

It appeared, however, that nothing whatever had been said about appellant in the prior Siskin trial. The confession that Siskin made was not read in evidence, and, accordingly, no mention of appellant's name in it was disclosed to the jury on the prior trial. The proofs in the two cases were different. The violations of the statute in

[1] The court also mentioned as an exception to the rule the situation where a consignee takes charge of the shipment in order to unload it at some point other than what would be its destination. But such exception is not applicable to the present case.

one case were separate and distinct from those in the other and were committed under different and disconnected circumstances; and the record does not disclose that any evidence was produced on the prior Siskin trial that bore upon appellant's case, or that the offenses charged against appellant were made the subject of proofs in the prior case. On the voir dire examination of the jury conducted by the trial court, it was mentioned by the judge, when a juror volunteered the statement that he had sat on the prior case, that nothing had been said about appellant in that case except that he might have bought some property. In answer to the court's interrogation, the juror in question had replied that such circumstance had left no impression about either the guilt or the innocence of appellant in the case in which he was being tried.

The evidence discloses that the trial court stated, after interrogating one of the jurors who sat on the prior case as to whether such service on the jury left any impression of appellant's guilt or innocence, that the juror in question was competent. Counsel for appellant, however, considered this statement of the court meant that the fact of service on the prior jury did not constitute grounds of challenge for cause. At the time the jury in appellant's case was sworn, including the three jurors who had sat on the prior Siskin case, counsel for appellant had exhausted all their peremptory challenges. The trial court observed on the hearing of a motion for a new trial that in his interrogation, he had ascertained that the jurors were competent; that they may have been subject to challenge for cause; although they were not challenged for cause, but, in fact, accepted.

Whether appellant properly challenged for cause or not, we think it proper to consider whether appellant was prejudiced in his right to a fair trial by the fact that three jurors who sat in the Siskin trial were jurors who subsequently convicted him. While the evidence was not the same

against Siskin and appellant, both cases were concerned with the theft of property from the same boxcars. The witnesses who testified as to breaking the seals and stealing the property were presumably the same in both cases, although it does not appear from the record before us who the witnesses were in the Siskin case. Moreover, the witnesses who testified that they sold the stolen material to appellant were presumably the same as those who testified that they had sold other stolen material to Siskin. The jury, therefore, in the prior Siskin case, had probably passed upon the challenged credibility of the three main witnesses and had believed them in their testimony that they had sold the property to Siskin, and that he had guilty knowledge. Three of the members of this jury who had resolved the question of credibility in favor of the three witnesses in the Siskin case were called upon to resolve the credibility of the same three witnesses in appellant's case; and they resolved the question in favor of the witnesses as against appellant's testimony.

Yet there was no reason, merely because of the above circumstances, why a jury in appellant's case—including some members who had sat in the prior case—would have been more prone to believe the testimony of the three convicted felons than the testimony of appellant, a man bearing an unquestioned reputation for honesty, who had never before been in any trouble, and whose standing in the community as a good citizen was appreciated by the trial judge himself, as he stated during proceedings prior to sentence. And this consideration is emphasized by the fact that the jury in appellant's case was carefully instructed by the court on the necessity of the government's proving appellant's guilt beyond a reasonable doubt; that the appellant was presumed to be innocent "and this presumption stands as a witness for him throughout the case";

and that, upon his proof of good character, "that character stands as a witness for him, throughout the case."

It is to be said that the verdict of the jury might be accounted for by the fact that, in addition to the testimony of the three witnesses above mentioned, there was a body of evidence which the jury could consider as bearing upon the question of appellant's guilt. It appeared that police officers, who came to see appellant and told him they were making an investigation about property stolen from railroad cars, stated that he became antagonistic; that he threatened "to wipe up the street" with one of the agents of the Federal Bureau of Investigation; that when they asked him for his records of material purchased, which were required to be kept by the ordinances of the City of Chattanooga and the laws of the State of Tennessee, he said he did not have any records; that he finally got a book and gave it to Officer Russell, but then jerked it out of Russell's hands and said that he would let his lawyer show him the book. Appellant was then arrested, taken to jail where he was held for about ten minutes, and then, after being represented by his lawyer, appeared in court in answer to a charge of not keeping his records as required by law, pleaded guilty and paid a fine of $50.00 and costs. In explanation of certain of the foregoing circumstances, appellant claimed that, as an honest businessman, he was incensed by the intimation of a charge that he was a receiver of stolen property, and that his conduct toward the officers was the result of his indignation over what he felt was an invasion of his rights as a citizen. All of these matters and claims were reviewed in a manner particularly fair to appellant by the trial court in the course of its instructions to the jury. The jury obviously considered this proof bearing upon appellant's attitude and conduct, as corroboration of the testimony of witnesses who had stated that

they had sold him the stolen property, and as evidence of appellant's guilt.

The jury's verdict of guilt, therefore, could not have been vitiated by the circumstances that three members had sat on a previous case in which they had believed the testimony of the same felons whom they afterward also believed as witnesses in appellant's case. Appellant suffered no deprivation of a fair trial as a result of the service of some of the jurors in the prior case. Hindsight, possessed by everyone, suggests that it would have been the part of wisdom, however, not to have called any of the jurors who sat on the Siskin case to sit on appellant's case, inasmuch as serious and vital questions as to whether a defendant in a criminal case has had a fair trial often arise in this way.

It is contended by appellant that a new trial should have been granted on the ground that one of the witnesses repudiated his testimony after the verdict. The witness in question, Joe Denson, had testified on the trial that while employed by appellant, he had seen the three witnesses who had admitted the theft unloading rolls of copper wire from their truck onto the scales at appellant's junk yard; that he had also seen some boys throw metal goods over the fence at the yard. He further stated that, prior to the time he appeared before the grand jury, appellant told him that he did not want him to testify about anything that was thrown over the fence nor to talk any more about the case; and that he was in appellant's employ subsequent to his testimony before the grand jury. On cross-examination, he stated that he had been rejected for service in the army but that he did not know the reason for the rejection; that he did not "think" he could read; that he could barely write his name; that he did not know what month the boys with the metal had come to appellant's yard; that he could not add figures—did not know the sum of four and four; that he could not count; that he did not know what day

or date it was; and that he had talked that morning to one of the counsel for the government. On redirect examination, he stated that when he talked to the government counsel about testifying, counsel had stated that he wanted him to tell the truth no matter whether it hurt or helped the government or appellant; and that he had told the truth.

On the motion for a new trial, counsel for appellant informed the court that he had had a conference with the above mentioned witness, Joe Denson, after the trial of the case, and in the presence of his secretary; that he was aware that Denson's intelligence—"putting it mildly"—was such that it was a serious matter to have him make a statement on the witness stand under oath; that Denson had changed his statement about the facts of the case and that counsel would like to amend his motion for a new trial to include the claim of newly discovered evidence. The trial court then remarked: "They are charging this man perjured himself. He is gettting in plenty of trouble." Counsel for appellant stated that he realized that fact; and government counsel then stated that they would send Denson to the penitentiary if he changed his statement. The court then remarked that the substance of that aspect of the motion was that Denson had changed his story, and appellant's counsel stated that such was the fact; that Denson had declared he had never seen the boys throw anything over the fence; and that, instead of appellant's telling him not to say anything to the officers or discuss the boys who stole the property, appellant had told him to tell the truth. Counsel also stated that Denson had said that he was scared when he made his prior statement; that the agents of the Federal Bureau of Investigation had him in their office and repeatedly questioned him; and by suggesting that he had seen the boys throw the goods over the fence, had finally secured from him a "yes" statement which he gave in order to avoid further questioning; but that he had not seen

anything thrown over the fence and knew nothing about it. When Denson was then sworn as a witness on the hearing of the motion for a new trial, the court said:

> "Joe, I think it is my duty to warn you. Of course what we want is the truth. You have sworn one way here in court. The lawyers say you will swear another way. If you are going to testify different from that one way, you will probably incriminate yourself, what is called perjury. You can testify or not testify under those conditions. I do not believe a man can be forced to testify where he incriminates himself.
>
> "Do you want to testify, Joe?
>
> "WITNESS: I don't want to, Judge.
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> • • •
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> "THE COURT: Let the record show the witness not being of strong mentality, to be courteous to him, I think, under the protection of the Court because of his appearance, strength of mentality, and personality at that time particularly is entitled to the fifth amendment protection anyway."

Thereafter, counsel for appellant was permitted to set forth in an affidavit what Denson had told him and to file it in the case, the trial judge having previously remarked that he knew the lawyer was telling the truth but that he could not consider it without proof. In passing upon the motion for a new trial, the district judge stated that in his opinion, Denson's testimony "did not turn the balances on the jury, because the jury could see the kind of man he was and judge his testimony accordingly. Of course he is the type of man easy to go along with some one, somebody to get after him to back up. It is not at all unusual for the Court to have experienced witnesses testify on the stand and later want to back up when somebody has talked to them about it, not any particular pressure on them, but they do not like to offend anybody. We do not have that

phase in the case, I do not think. And, of course he did not have to testify and incriminate himself, whatever he was going to say if anything different. But I do not believe his testimony was the turning point in the case. In other words, I believe the jury would have convicted Mr. Winer whether he testified or not."

The trial judge, in his consideration of the question of Denson's change of his story and in his ruling denying the motion for a new trial based on that ground, in effect, considered the case in the same way as though Denson had actually testified before him on the hearing of the motion, and assumed that he had changed his story from the testimony which he had previously given.

From the cross-examination of Denson, it was clearly apparent to the jury that he was a man of small mentality. A witness who could not count, who did not know the day or date when asked him, and who was rejected for military service but did not know why, was the weakest kind of witness. Counsel for appellant felt that it was necessary to say that his intelligence was such that it was a serious matter for him to make a statement under oath at the time of the hearing of the motion for a new trial. The fact that the government used Denson as a witness; that he testified against appellant; and that after the trial, he made a statement contrary to his testimony before the jury, does not, under the circumstances of this case, compel a new trial on the ground that the witness willfully testified falsely to a material fact.

The granting or refusing of a new trial upon newly discovered evidence of an impeaching character, including the recantation of a w..ness, rests in the sound discretion of the trial court; and a new trial will not be granted on the grounds of newly discovered evidence, unless such evidence is of a nature that, on a new trial, it would probably

bring about a different result. It is for the trial judge to determine the probable effect it would have in changing the result on another trial; and in the absence of a clear showing of abuse of discretion, his action must stand. *Morton Butler Timber Co.* v. *United States*, 91 F. (2d) 884 (C. C. A. 6); *Larrison* v. *United States*, 24 F. (2d) 82 (C. C. A. 7); *People* v. *Shilitano*, 218 N. Y. 161, 112 N. E. 733, L. R. A. 1916F, 1044; *Heald* v. *United States*, 175 F. (2d) 878 (C. A. 10). We find no abuse of discretion in the refusal of the district court to grant a new trial.

If the trial court had permitted Denson to testify on the hearing of the motion in the manner and to the effect that counsel for appellant claimed that he would testify, and had then denied the motion for the same reasons as stated in the above quotation from his ruling, we would find no error. This being the case, we find no error in the action of the trial court in protecting Denson against self incrimination and, at the same time, in considering and ruling upon the motion for a new trial upon the assumption that Denson had changed his story as appellant's counsel said he had. By the same token, we find no prejudicial reversible error in the statement of government counsel, made on the hearing of the motion for a new trial, threatening Denson with the penitentiary if he committed perjury in changing his testimony for, as said above, the court's denial of the motion for a new trial was, in effect, made upon the assumption that Denson had changed his testimony.

In accordance with the foregoing, the judgment of the district court is affirmed.

MILLER, Circuit Judge, dissenting: I am of the opinion that the goods in question were not stolen from railroad cars which were parts of interstate shipments of freight, in

that at the time of the thefts the cars had arrived at their destination and had been delivered to and accepted by the consignee. *O'Kelley* v. *United States,* 116 F. (2d) 966, C. A. 8th.

In this case the physical transportation as called for by the bills of lading had been completely performed. The consignee had notice of arrival and had the cars placed on its storage tracks. The delay in unloading the cars was for the convenience of the consignee. It is a well settled common law rule with respect to the liability of a carrier, that when goods have arrived at their destination and at the request of and for the convenience of the consignee remain in the custody of the carrier, the status of the carrier is changed from that of a carrier to that of a warehouseman. *General American Transp. Corp.* v. *Indiana Harbor Belt R. Co.,* 191 F. (2d) 865, 873, C. A. 7th; *Gus Datillo Fruit Co.* v. *L. & N. R. Co.,* 251 Ky. 566, 569; *North Yakima Brewing & Malting Co.* v. *Northern Pacific R. W. Co.,* 49 Wash. 375, 16 L. R. A. (N.S.) 935; *Brown Shoe Co.* v. *Hardin,* 77 W. Va. 611, L. R. A. (N.S.), 1916D 1199; *Chicago, Milwaukee & St. P. R. W. Co.* v. *Keim,* 121 Minn. 343, 44 L. R. A. (N.S.) 995; *Brunson* v. *Atlantic Coast Line R. R. Co.,* (S. C.) 9 L. R. A. (N.S.) 577. Delivery by the carrier is completed when the car is placed on consignee's storage tracks, although it may be necessary later to move it to a platform for unloading purposes. *New York C. & H. R. R. Co.* v. *General Electric Co.,* 219 N. Y. 227, 1 A. L. R. 1417, with Annotation. In the present case, even if it be conceded that the cars were still in the custody of the carrier, they were in its custody as a warehouseman, not as a carrier. Theft of goods from a warehouseman is a state offense not covered by the statute. *Hall* v. *United States,* 182 F. (2d) 833, 835, C. A. 8th.

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